Nos. 91-543; 91-558; 91-563

IN THE

Supreme Court of the United States

October Term, 1991

THE STATE OF NEW YORK; THE COUNTY OF ALLEGANY; and THE COUNTY OF CORTLAND,

Petitioners,

against

THE UNITED STATES OF AMERICA; JAMES D. WATKINS, as Secretary of Energy; IVAN SELIN, as Chairman of the United States Nuclear Regulatory Commission; THE UNITED STATES NUCLEAR REGULATORY COMMISSION; ADMIRAL JAMES B. BUSEY, IV, as Acting Secretary of Transportation; and WILLIAM P. BARR, as United States Attorney General,

Respondents,

THE STATE OF WASHINGTON; THE STATE OF NEVADA; and THE STATE OF SOUTH CAROLINA,

Intervenors-Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER STATE OF NEW YORK

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(1779—LC5-588—1992)

Question Presented

Whether Congress, consistent with the limits imposed by the Constitution and especially the Tenth Amendment, may compel a State to "be responsible for" and develop a plan for the disposal of low-level radioactive waste produced by private, state, and some federal generators within the State's borders, and may require the State to take title to, assume possession of, and be legally liable for such waste if it fails to develop such a plan.

List of Parties in Proceeding Below

With the exception of Ivan Selin, James B. Busey, and William P. Barr, the parties listed on the caption are identical to those in the proceeding below. Mr. Selin has been substituted for Kenneth M. Carr as Chairman of the United States Nuclear Regulatory Commissioner. Mr. Busey has been substituted for Samuel K. Skinner as (Acting) Secretary of Transportation. Mr. Barr as been substituted for Richard Thornburgh as United States Attorney General.

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Citation of Opinions and Judgments Below

The opinion of the court of appeals (Pet. App. 1a-17a)[1] is reported at 942 F.2d 114. The opinion of the district court (Pet. App. 18a-26a) is reported at 757 F.Supp. 10.

[1] "Pet. App." refers to the appendix to the petition for writ of certiorari filed in this matter by the State of New York (No. 91-543).

Statement of Grounds for Jurisdiction

Invoking federal jurisdiction under 28 USC §§ 1331, 1337, 1346, 2201 and 2202, petitioner State of New York and other petitioners brought this suit in the United State District Court for the Northern District of New York. On December 7, 1990, the District Court granted defendants' motion to dismiss the complaint.

On plaintiffs' appeals, the Court of Appeals for the Second Circuit on August 8, 1991 entered a judgment and opinion affirming the District Court's order.

Invoking this Court's jurisdiction under 28 USC § 1254(1), petitioner State of New York filed its petition for a writ of certiorari on September 30, 1991. Certiorari was granted by the Court on January 10, 1992.

Constitutional and Statutory Provisions Involved

United States Constitution, Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution, Article IV, § 4:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

The Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 USC §§ 2021b-2021j):

See Appendix.

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BRIEF FOR PETITIONER STATE OF NEW YORK

Statement of the Case

This appeal addresses the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240 (the 1985 Act, LLRWPAA), incorporated in 42 USC § 2021b *et seq.* The statute was a congressional effort to deal comprehensively with one of the most difficult problems of nuclear technology: the secure disposal of low-level radioactive waste. In this brief, the State of New York will argue that this statute, though enacted by a well-intentioned Congress, is constitutionally deficient in its imposition of uniquely intrusive affirmative obligations upon sovereign state governments.

Since 1978, only three commercial sites have been available for low-level radioactive waste disposal in the United States: Beatty, Nevada; Barnwell, South Carolina; and Hanford, Washington. 1985 U.S. Code Cong. & Admin. News, pp 3005-3006. Safety concerns and plans to limit and ultimately discontinue waste disposal at these facilities prompted Congress to pass the Low-Level Radioactive Waste Policy Act of 1980, Pub. L. 96-573 (the 1980 Act).

That legislation set forth a federal policy that each State, in its capacity as sovereign State, be responsible for providing for the disposal of low-level radioactive waste generated within its borders by private, state, and certain federal producers.[2] It did not, however, require a State to accept such responsibility. The 1980 Act also encouraged States to form interstate compacts to meet these duties and specifically provided that compact States might bar use of compact facilities for the disposal of waste generated outside the compact region after January 1, 1986. Pub. L. 96-573, §§4(a)(1), 4(a)(2)(B).

[2]Low-level radioactive waste was defined in the 1980 Act as "radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e.(2) of the Atomic Energy Act of 1954." Pub. L. 96-573, § 2(2).

While a majority of States joined or proposed to join compacts in the years following the passage of the 1980 Act, no new state or regional disposal facilities were projected to become operational until the early 1990s. Consequently, the exclusion provision of the 1980 Act posed a problem: congressional ratification of proposed compacts whose members operated existing disposal sites (Washington, Nevada, and South Carolina) would have denied access to the only possible disposal sites to all waste from States which were not in those compacts. Accordingly, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 USC §§ 2021b-2021j) to permit ratification of proposed compacts, spur further compact formation, and grant all States continued limited access to existing disposal sites.[3]

The 1985 Act differed from its predecessor in several significant respects. It directly assigned to the States in their sovereign capacity responsibility[4] for the disposal of low-level radioactive waste.[5] It conditionally guaranteed access to dis-

[3]Title I of Public Law 99-240, 99 Stat 1842, constituting the LLRWPAA, was incorporated in 42 USC §§ 2021b-2021j. Public Law 99-240, Title II, 91 Stat 1859, constituting the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, granted Congress's consent to seven proposed regional compacts.

[4]Section 3(a) of the 1985 Act (42 USC § 2021c[a][1]) provides that "[e]ach State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of . . . low-level radioactive waste generated within the State . . . ."

[5]The 1985 Act defines low-level radioactive waste (LLRW) as radioactive material that: (a) is not "high-level" radioactive waste, spent nuclear fuel, or by-product material as defined at 42 USC § 2014(e)(2); and (b) is classified as LLRW by the Nuclear Regulatory Commission. Nationwide, about 90% of the volume and 97% of the total radioactivity of LLRW for which the 1985 Act assigns disposal responsibility to the States comes from nuclear power plants and other industrial sources; the remainder is generated by research laboratories, hospitals, and medical centers.

The Act requires the States to be responsible for disposal of Class A and Class B waste (containing radioactivity which will diminish to a level acceptable for inadvertent exposure within 100 years [10 CFR § 61.7(b)(4)]), and Class C waste (requiring protection against inadvertent exposure for 500 years (10 CFR § 61.7(b)(5)]). Class C Waste comprises less than 1% of volume but constitutes over 65% of the radioactivity of all LLRW.

posal sites in Washington, Nevada, and South Carolina for low-level radioactive waste from all States between January 1, 1986 and December 31, 1992, and set forth a detailed transition scheme, with incentives and penalties, designed to encourage compact formation and force disposal site development. 42 USC § 2021e. By specific dates within that period, States and compacts were directed to comply with a number of regulatory requirements, including ratification of compact legislation or indication of an individual State's intent to develop a separate low-level waste disposal facility for waste generated in-state, development of a siting plan, and application for a facility license to the Nuclear Regulatory Commission or appropriate agency of an agreement State (2021e[e][1]). Failure to meet this schedule might result in added surcharges upon waste generators by disposal site operators, denial of access to the Washington, Nevada, and South Carolina sites, and loss of certain surcharge rebates to the States (2021e[d], [e]).

The most novel and intrusive of the affirmative directives in the 1985 Act, however, was set forth in 42 USC § 2021e(d)(2)(C):

> If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

With this so-called "take title" provision, Congress decisively altered the method and impact of prior legislation regulating low-level radioactive waste disposal through encouragement and voluntary incentives. The new Act coupled "responsibility" for such waste with a mandate that each State develop and carry out a program for the disposal of waste generated within its borders by private and other generators, including some federal generators. It strengthened this mandate through the command that States assume ownership and possession of, as well as legal liability for, such waste if they fail to comply with the federal scheme and timetable of regulation.

New York State's congressional delegation participated in the enactment of both the 1980 and the 1985 Acts. In addition, various national lobbying groups, including the National Governors' Association, contributed proposals and advice to Congressional committees in the early stages of each enactment.

To comply with the deadlines and other constraints of the 1985 Act, New York State enacted Chapter 673 of the Laws of 1986. Among its many provisions, this legislation called for (1) the promulgation of standards of site selection and disposal of low-level waste by the New York State Department of Environmental Conservation; (2) the creation of a Siting Commission to select a disposal site and methodology; and (3) construction of a disposal facility by the New York State Energy Research and Development Authority.[6] To date, the Siting Commission created under Chapter 673 has identified five potential disposal sites within the State. Three of these sites are located in Allegany County; the remaining two sites are in Cortland County.

[6]Laws of New York 1986, chap. 673 was subsequently amended by Laws of New York 1990, chap. 368 (providing that title to low-level radioactive waste shall at all times remain in the generator of such waste—even after such time as the waste has been accepted at the disposal facility), and Laws of New York 1990, chap. 913 (expanding membership and tasks of the Siting Commission).

In February, 1990, the State of New York, together with the Counties of Allegany and Cortland, commenced an action in the United States District Court for the Northern District of New York against various federal defendants, seeking a declaration that the LLRWPAA's imposition of broad new affirmative duties upon the States violated the Tenth and Eleventh Amendments, as well as the Due Process and Guarantee Clauses of the United States Constitution. The States of Washington, Nevada, and South Carolina subsequently joined the action as intervenors in support of defendants.

The District Court (Cholakis, J.) granted defendants' motion for summary judgment and dismissal of the complaint in a bench decision issued in December, 1990. Reciting this Court's statement in *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985), that "judicial review of Congressional enactments founded on Commerce Clause powers should be limited primarily to inquiry of whether the political process has failed," the district court held that Tenth Amendment review was proper only to discern "problems which may have had an untoward effect on a particular law's enactment or its subsequent political review" (Pet. App. 25a). Finding that the 1985 Act imposed no restriction on New York's "ability to operate in the political arena and to challenge the law," the court found judicial review unwarranted on grounds of a failure of the political process (Pet. App. 25a).

While recognizing that *Garcia* left open the possibility of judicial review of the substantive impact of federal action under the Commerce Clause in exceptional cases, the court ruled that such exceptions arose only "when constitutional equality among the states has been jeopardized" by the federal act (Pet. App. 23a). Finding no such jeopardy, nor other grounds for constitutional attack, in the 1985 Act, the court dismissed the State's and counties' complaint (Pet. App. 26a).

On appeal, the Court of Appeals for the Second Circuit affirmed. In its decision, the court observed that, in light of Congress's traditional role in nuclear regulation, "appellants undertake an unusually burdensome task" in challenging the 1985 Act (Pet. App. 10a). The court held that "both the 1980 Act and its 1985 Amendments are paragons of legislative success" (Pet. App. 13a), and rejected any claim that the Act or its take title provision was the product of a failure in the political process.

The court found unpersuasive appellants' argument that *Garcia* permitted review of congressional mandates, such as the take title provision, which significantly limited the States' role in the federal system and thereby altered the federal constitutional structure. While the court neither confirmed nor denied that such review is permissible, it endorsed the district court's holding that such review, if permissible, should consider only whether the federal act upset the "equality in dignity and power" among the several States (Pet. App. 15a; citing *Coyle v Oklahoma*, 221 US 559 [1911]). The 1985 Act, it held, had no such effect. "In sum," the court noted (Pet. App. 16a),

> we are satisfied that the take title provision does not undermine the constitutional structure. Neither does it violate principles of federalism as recently explained in *Garcia;* and '[w]here, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated.' *[South Carolina v] Baker,* 485 U.S. [505 (1988)] at 513 (emphasis in original).

The court also dismissed challenges to the Act based upon the Eleventh Amendment and the Guarantee Clause (Pet. App. 16a-17a), and affirmed the grant of summary judgment to defendants.

New York, Allegany and Cortland filed separate petitions for writs of certiorari to this Court on September 27, October 2, and October 3, 1991. The petitions were consolidated and certiorari was granted on January 10, 1992.

SUMMARY OF THE ARGUMENT

This Court in *Garcia*, while stating that in most instances it would not entertain Tenth Amendment challenges to federal acts, recognized that statutes impairing the constitutional structure might require review but declined to identify when such review was appropriate. We argue in the first point that this case, where the challenged Act imposes unconditional affirmative obligations on States and only on States, presents the quintessential situation where judicial review is needed under the Tenth Amendment and the principles of federalism inherent in the federal constitutional structure. Unlike the LLRWPAA, the Fair Labor Standards Act at issue in *Garcia* applied alike to private entities and States and imposed duties where the States had voluntarily undertaken the activity addressed by the federal regulatory scheme. Neither *Garcia* nor cases reviewed by the Court there involved laws enacted under the Commerce Clause to compel state governments to engage in a particular activity without their consent. While this Court has never squarely addressed this type of law, it has on a number of occasions expressed serious reservations about the constitutional authority for Congress to take such an action. The opportunity for the State to act through its legislature in deciding whether to participate in a federal program is an essential element of the structure of the federal system. Since the sovereignty of States, which is critical to the preservation of the federal system, is severely compromised absent such an opportunity, it would appear that this Court in *Garcia* must have contemplated review of this type of act by the courts.

We also argue that if this Court's holding in *Garcia* cannot be interpreted to permit such review, that holding should be clarified or modified to authorize unequivocally substantive Tenth Amendment review of federal acts which, like the LLRWPAA, impose significantly intrusive and unavoidable demands solely upon the sovereign States in the furtherance of a federal regulatory scheme.

In Point II we argue that, upon such substantive review, the imposition by Congress of unconditional affirmative duties upon States, and solely on the States, for the decentralized disposal of low-level radioactive waste under the LLRWPAA violates the Tenth Amendment and the Guarantee Clause of the Constitution.

The present Act differs materially from all federal actions previously reviewed by the Court under the Tenth Amendment. In the past Congress has either applied legislative standards under the Commerce Clause alike to the States and to non-governmental entities or has induced States to undertake desired activities through threat of preemption or the commitment of federal funds. The present Act is in sharp contrast. It simply declares that the States are responsible for the permanent disposal of most specified low-level radioactive waste generated within their borders in accordance with various federal requirements and that if all requirements are not met by January 1, 1996, the States will be required to take title to all such waste proffered them and be liable for any damages incurred by private generators where the State has failed to take possession. In this way, the Congress has commandeered the States' sovereign authority to deal with a national concern and deprived the States of any independent opportunity to decide whether to participate in such a federally mandated program. This means of dealing with a problem of admitted national concern is unacceptable because it totally undermines the existence of States as independent sovereign entities.

Acceptance of such an approach would relegate States to a status of mere departments of the federal government.

Finally, we argue that, contrary to the position of the federal government below, the take title provision cannot properly be severed from the rest of the Act. The proponents of the 1985 Act viewed the threat of the take title provision as essential to assure States' compliance with the other provisions of the Act. Thus, it is unrealistic to assume Congress would have enacted the LLRWPAA without that provision. Accordingly, the entire 1985 Act must be declared unconstitutional.

ARGUMENT

POINT I

This Court should subject the 1985 act to substantive review under the Tenth Amendment.

Although this Court determined in 1985 that the primary protection of state sovereign interests in the federal system lay with the federal political process, *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528 (1985), it stated then that its holding did not preclude all substantive review of Congressional action against Tenth Amendment challenges. At that time, the Court chose not to delineate what particular issues might remain open to such review. The LLRWPAA presents such an issue.

In *Garcia*, the Court was asked to determine whether the Fair Labor Standards Act (FLSA), with its overtime, recordkeeping, and other requirements, was applicable to publicly owned mass transit systems, just as it was to other employers in the private sector. The San Antonio Metropolitan Transit Authority argued that its status as a public authority performing a "traditional government function" vested it with

constitutional immunity from the Act's provisions under *National League of Cities v Usery*, 426 US 833 (1977).[7] This Court did not agree. Though it recognized the enduring quality of state sovereign authority in the federal system (469 US at 549), the Court specifically rejected the notion that "free-standing conceptions of state sovereignty" could be employed to differentiate among various state affirmative acts for purposes of Commerce Clause analysis. Such conceptions, the Court observed, had proved analytically inadequate and had too often provided past courts with the opportunity to intrude into States' affairs (469 US at 546, emphasis added):

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the *States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be*. Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. "The science of government . . . is the science of experiment," *Anderson v Dunn*, 6 Wheat. 204, 226 (1821), and the States cannot serve as laboratories for social and economic experiment, see *New State Ice Co. v Liebmann*, 285 US 262, 311 (1932) (Brandeis, J., dissenting), if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society had left in private hands.

[7] Under *National League*, a federal act violated the Tenth Amendment if it (1) regulated "states as states"; (2) addressed indisputable attributes of state sovereignty; (3) directly impaired States' operations in traditional government functions; and (4) did not reflect a federal interest which justified State submission to the federal action. *Hodel v Virginia Surface Mining & Rec. Assn.*, 452 US 264, 287-288 n 29 (1981).

The *Garcia* holding, therefore, expressed this Court's dissatisfaction with the prospect of ongoing judicial assessment of whether a State's activity in the modern economy was a sovereign one. Once a State has chosen to act in a sphere subject to federal regulation, the State's susceptibility to such regulation was a matter to be left, in a majority of cases, to the federal legislative and political process.

While this majority view in *Garcia* induced vigorous and well-reasoned dissents,[8] both the context and the express terms of the holding make it clear that even the majority was unwilling to permit unconstrained federal regulation of States through the Commerce Clause. Neither *Garcia* nor the cases reviewed there addressed the propriety of federal laws which, under the powers of the Commerce Clause, compelled state governments to engage in a particular activity against their will; which limited the States' right to withdraw from activity in a particular field; or which required States to participate as regulatory agents in a scheme of federal regulation. Moreover, this Court in *Garcia* expressly recognized that additional Tenth Amendment protection might be available to the States in cases where federal action, though not the product of a defective political process, was more intrusive than that reviewed in *Garcia* or its antecedents, stating (469 US at 556):

> These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. See *Coyle v Oklahoma*, 221 U.S. 559 (1911).

[8]*See*, 469 US at 557 (Powell, J., dissenting), 469 US at 579 (Rehnquist, J., dissenting), and 469 US at 580 (O'Connor, J., dissenting).

The benefits and importance of the constitutional structure referred to in *Garcia* have been set forth by this Court in numerous opinions.[9] Most recently, in *Gregory v Ashcroft*, ____ US ____, 111 S Ct 2395, 2399-2400, 115 L Ed 2d 410, 422-423 (1991), the Court stated:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it

[9]*See, e.g., Lane County v Oregon*, 74 US 71, 76 (1868) ("[I]n many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved."); *Texas v White*, 74 US 700, 725 (1868) ("Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provision, looks to an indestructible union, composed of indestructible States."); *Coyle v Oklahoma*, 221 US 559, 567 (1911) (" 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."); *Fry v United States*, 421 US 542, 557 (1975) (Rehnquist, J., dissenting) ("Both [the Tenth and the Eleventh] Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation."); *Federal Energy Regulatory Commission (FERC) v Mississippi*, 456 US 742, 777 (O'Connor, J., dissenting in part) ("State legislative and administrative bodies are not field offices of the national bureaucracy. Nor are they think tanks to which Congress may assign problems for extended study. Instead, each State is sovereign within its own domain, governing its citizens and providing for their general welfare. While the Constitution and federal statutes define the boundaries of that domain, they do not harness state power for national purposes.")

increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. . . .

Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . .

. . . In the tension between federal and state power lies the promise of liberty.

These advantages inherent within the constitutional structure of the federal system are of fundamental importance to our nation and its citizens. They reflect the clear intent of the Constitutional Framers; [10] they have been a focal point of high regard for the American constitutional system for two centuries.[11]

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[10]*See*, the historical precis contained in Justice O'Connor's partial dissent from the majority opinion in *Federal Energy Regulatory Commission (FERC) v. Mississippi*, 456 US 742, 795-796 (1982). *See also, Garcia v. San Antonio Metropolitan Transit Authority*, 469 US at 568-579 (1985) (Powell, J. dissenting); *EEOC v. Wyoming*, 460 US 226, 265 (1983) (Powell, J., dissenting); *National League of Cities v. Usery*, 426 US 833, 842-845 (1976) (Rehnquist, J.). In light of these thorough discussions of the subject, we shall not essay in this brief an historical treatment of the Framers' or this Court's views of these federalist principles.

[11]*See, e.g., The Federalist*, Nos. 1, 2, 9, 14, 37, 39, 40, 43, 45, 46; Jefferson, Letter to Gideon Granger, August 13, 1800; Tocqueville, *Democracy in America* 158-163 (Anchor Books, 1969); Lippman, *The Essential Lippman* 220-221 (1963). Scholarly literature addressing the importance of some or all aspects of the federal system is vast; significant (Footnote continued on next page.)

While the precise extent of the Court's concern for the constitutional structure has never been fully articulated, at least two features of that structure have repeatedly been the focus of review of federal action under the Commerce Clause by the Court: (1) the ability of state governments to make independent policy choices about whether to engage in state government activities, and (2) the power of state governments to enact or decline to enact legislation. Several significant Tenth Amendment cases decided by this Court in recent years clearly reflect these concerns. In *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 US 264 (1981), this Court considered a Tenth Amendment challenge to the Surface Mining Control and Reclamation Act of 1977, which established a two-stage program for the nationwide regulation of surface coal mining. The Act empowered the Department of the Interior to promulgate and enforce regulations; States were afforded the opportunity to operate their own regulatory programs so long as such programs complied with federal regulatory standards. 452 US at 268-272. Reversing a lower court determination that the Act violated the Tenth Amendment under *National League*, this Court held unobjectionable the Congress's power to displace state regulation of private activities affecting interstate commerce in a way which "curtails or prohibits" the States' prerogatives to make legislative choices. 452 US at 290. It noted (452 US at 280) that the Surface Mining Act merely established

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(Footnote continued.)

recent statements include Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489 (1954); Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 S.Ct. Rev. 81; Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1 (1988); Friendly, Federalism: A Foreword, 86 Yale L.J. 1019, 1034 (1977); Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709 (1985); Diamond, *The Federalist* on Federalism: "Neither a National nor a Federal Constitution, but a Composition of Both", 86 Yale L.J. 1273 (1977); La Pierre, Political Accountability in the National Political Process—the Alternative to Judicial Review of Federalism Issues, 80 Nw. U.L.Rev. 557, 635ff (1985).

> a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.

This Court in *Hodel* distinguished the Surface Mining Act's establishment of federal minimum regulatory standards upon private activity in the States from the imposition of regulatory obligations upon state governments, which would raise more difficult constitutional questions (452 US at 288):

> [T]he States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.

While the Commerce Clause permitted limitations on States which chose to regulate a field concurrently regulated by the federal government, Congressional acts compelling States to regulate remained constitutionally suspect.[12]

[12]In *Hodel*, the Court specifically distinguished three prior cases where a federal regulation appeared to commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. 452 US at 288-289. *See, e.g., Maryland v. EPA*, 530 F2d 215 (4th Cir 1975), *vacated and remanded for consideration of mootness sub nom. EPA v. Brown*, 431 US 99 (1977) (*per curiam*) (EPA regulations compelling states to establish and fund automobile inspection programs under penalty of criminal and civil sanctions upon non-complying States violate Tenth Amendment); *Brown v. EPA*, 521 F2d 827 (9th (Footnote continued on next page.)

This holding in *Hodel* was reaffirmed in *FERC v. Mississippi*, 456 US 742 (1982), in which the Court addressed a Tenth Amendment challenge to certain sections of the Public Utility Regulatory Policies Act of 1978 (PURPA). Among that Act's many provisions were requirements that state utility regulatory authorities (1) consider implementation of certain specific regulatory standards regarding electricity and gas services; (2) hold public hearings on such standards; and (3) implement rules promulgated by FERC for encouraging development of cogeneration facilities. The Act also provided that private parties could compel consideration of the federal standards through a state court action.

Noting at one point that the case appeared to present an issue of first impression—the review of legislation in which "the Federal Government attempts to use state regulatory machinery to advance federal goals," 456 US at 759—this Court in *FERC* upheld each of these provisions against Tenth Amendment attack. While deeming the requirements that States hold public hearings and consider implementation of certain regulatory practices to be merely a minor infringement upon state sovereignty, the Court held that even this infringement could be avoided by States which chose to decline to regulate the field. 456 US at 764. It further stated (456 US at 765-766):

(Footnote continued.)
Cir 1975), *vacated and remanded for consideration of mootness sub nom. EPA v. Brown*, 431 US 99 (1977) (*per curiam*) (same); *District of Columbia v. Train*, 521 F2d 971 (D.C. Cir 1975), *vacated and remanded for consideration of mootness sub nom. EPA v. Brown*, 431 US 99 (1977) (*per curiam*) (same). *Contra, Pennsylvania v. EPA*, 500 F2d 246 (3rd Cir 1974). After the Supreme Court had granted *certiorari* in three EPA cases in 1976, the EPA rescinded some of the regulations and conceded that others were invalid unless modified. The Court consequently vacated and remanded these cases without ruling on the constitutionality of the regulations. 431 US at 103-04.

> While the condition here is affirmative in nature—that is, it directs the States to entertain proposals—nothing in this Court's cases suggests that the nature of the condition makes it a constitutionally improper one. There is nothing in PURPA "directly compelling" the States to enact a legislative program. In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' "separate and independent existence" [citations omitted], and do not impair the ability of the States "to function effectively in a federal system." [citations omitted.]

Thus *FERC*, like *Hodel*, clearly suggested that federal compulsion of a state action under the Commerce Clause remained constitutionally suspect insofar as it was unrelated to an activity which the State chose to undertake or continue.

While the majority in *South Carolina v Baker*, 485 US 505 (1988), left open the possibility that the teachings of *FERC* on this issue might to some degree have been modified by *Garcia* (485 US at 513), this Court did not address the issue as such because it was unnecessary to do so. The federal act challenged in *Baker*—section 310(b) (1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)—removed federal income tax exemptions for interest earned on new bonds issued by state and local governments unless the bonds were issued in registered form. Designed to provide a strong incentive to encourage governments to issue registered bonds, this portion of the Act merely provided that bondholders of States which did not comply with the federal regulatory scheme would forfeit the tax benefits previously extended to them by the federal government. As this Court noted in rejecting a claim that the effect of TEFRA was to commandeer South Carolina's legislative process (485 US at 514-15, emphasis added):

> Such "commandeering" is . . . an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That *a State wishing to engage in certain activity* must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Once again, the Court recognized that permissible federal mandates to States as sovereigns were always linked to a State's willing participation in the particular activity involved.

It is clear from this brief review of *Baker*, *FERC* and *Hodel*, as well as an examination of the EPA cases, that federal regulation of voluntary state activities based upon the Commerce Clause or federal inducements to States to take action have engendered a lesser degree of constitutional concern than the imposition of affirmative duties on the States which, by requiring States to initiate new programs or continue to be involved in programs that they had already undertaken, curtail their ability to make independent policy or legislative choices. In this respect, the differences between the LLRWPAA and each of the federal Acts examined by this Court in *Hodel*, *FERC*, *Garcia*, and *Baker* are significant. Unlike the FLSA and TEFRA, which extended to state and local governments various "generally applicable regulations" (*Baker*, 485 US at 515), the 1985 Act imposed various requirements solely upon the States as sovereigns. Unlike the regulatory activities urged upon the States under the Surface Mining Act or PURPA, which could be avoided by a State's decision to withdraw from the regulatory field, the 1985 Act imposes upon the States an unconditional affirmative obligation to participate in the federal regulatory scheme. That type of obligation seriously impinges on the basic constitutional structure by divesting the States of the decision-making authority inherent in our federal system. Accordingly, legislation such as the LLRWPAA must

be subject to review to protect the States' essential role in the federal system. We believe that review comes within the scope of *Garcia*.

The opportunity for the State to act through its legislature in determining whether or not to participate in a federal program is an essential aspect of the structure of the federal system. Without such opportunity that structure is severely compromised. Absent the ability to abstain from administering federal regulatory schemes which invoke the States' sovereign powers, state governments may be forced to become unwilling subordinate agents to Congressional dictates. Without the power to choose alternative actions, States are sharply constrained in their function, noted in *Garcia* and repeated in *Ashcroft*, to serve as laboratories for social and economic experiment, or "to engage in any activity that their citizens choose for the common weal." 469 US at 546. Without such choices, not only may States be compelled to participate in federal regulatory schemes by inescapable congressional fiat, but they may also be obliged to assume responsibility for the full financial and administrative burden of such schemes.

Consequently, if this Court were to find that the language of its *Garcia* ruling did not contemplate Tenth Amendment review of laws such as the 1985 Act, we urge the Court to clarify or modify *Garcia* to establish the propriety of such review. As we have set forth *supra*, the federal framework incorporated within the Constitution provides the fundamental structure for balanced and effective representative government both in the States and at the federal level. This Court's power to review federal action affecting this structure, acknowledged since *Marbury v Madison*, (1 Cranch) 137 (1803), is as vital a safeguard to national liberty as the text of the Constitution itself. Unless that power is exercised by this Court in the present context, the opportunity of the Congress to compel involuntary state activity and to commandeer state govern-

ment resources and operations through the Commerce Clause would appear to be unlimited.

POINT II

The 1985 Act should be declared unconstitutional.

A.

Upon substantive review, this Court should find that the 1985 Act impermissibly alters the balance of federal-state relations by its imposition of affirmative obligations for the disposal of low-level radioactive waste upon the States and should declare the Act unconstitutional in its entirety.

The 1985 Act differs fundamentally from all federal actions previously reviewed by this Court under the Tenth Amendment. While it is not the first congressional act which seeks to have the States exercise their sovereign powers for federal purposes, it appears to be the first to impose upon each State an affirmative duty to exercise sovereign powers of legislation and other action within the State, in accordance with a federal regulatory scheme, without the State's consent, and with no option for the State's withdrawal from the role of regulator or actor in the field. The imposition is threefold: the broad assignment to the States of "responsibility" for a federal regulatory concern; the establishment of parameters and a timetable for compliance with that assignment of action; and the attachment of draconian, affirmative obligations on the States for a refusal or failure to meet that regulatory responsibility or timetable.[13] By congressional fiat and without

[13]The constitutional implications of these obligations were not lost upon commentators at the time of the Act's passage. As one reviewer noted:

> Certainly, the Congress, as is each state, is free to exercise its powers to designate sites and to construct and operate low-level waste disposal facilities. But for the Congress to mandate that the states must undertake the burden of providing waste facilities without any provision for federal funding or fact obligations,

(Footnote continued on next page.)

regard for current or past state desire or practice, the Act declares individual state governments to be responsible for a problem which Congress has determined to be of national concern.

Moreover, the duties imposed upon the States under the Act are neither minimal nor short-lived. Instead, they require the States to undertake a commitment to provide for permanent disposal of hazardous materials—a commitment which by its terms will endure for five centuries. The Act provides States with no opportunity to decline or withdraw from this obligation.

Furthermore, the Act attributes to the States responsibility for waste problems which are principally caused by private generators regulated by the federal government. Although state power plants, hospitals, and research facilities generate low-level radioactive waste, and although agreement States may voluntarily impose some regulations upon certain radioactive materials and wastes within their borders, the federal government nonetheless retains firm control over health and safety regulation of nuclear power and by-products which are responsible for the overwhelming majority of low-level radioactive wastes. The ability of the States to limit the creation of radioactive wastes for which the Act makes them responsible, therefore, is sharply constrained.

(Footnote continued.)

liabilities, or any other sanctions imposed under federal law may raise 10th Amendment problems. There does not appear to be pertinent judicial precedent that has upheld in the face of 10th Amendment objections a federal mandate as intrusive on state sovereignty as the one at issue here.

Memorandum from the Congressional Research Service to the Subcommittee on Energy Conservation and Power, House Committee on Energy and Commerce, "Constitutional Issues Raised By the Imposition of Liabilities on the State Under a Proposed Amendment to the Low-Level Radioactive Waste Policy Act of 1980," December 16, 1985.

Most significantly, under the 1985 Act, after January 1, 1996, States which do not provide for disposal of low-level radioactive waste generated within their borders are made responsible by the Federal government for all such waste generated by private producers and some federal producers throughout the State. In a manner to our knowledge unprecedented, the take title provision transfers by congressional edict the ownership obligations of federal and private parties to the State. States are compelled by this provision to exercise their sovereign powers as agents of federal regulation, not as a consequence of reflection and decision by state legislative and executive bodies, but by fiat of the Federal government. These duties and obligations are not imposed upon the State in its capacity as a generator of low-level waste like any other economic actor.[14] Rather, they are imposed solely in light of the State's sovereign capacity.

These features of the Act pose a sharp challenge to the constitutional structure of the federalist system and deprive States and their citizens of the various advantages assured by that structure. States and state citizens are denied the opportunity to decide, through their state governmental process, whether state fiscal and legislative resources should be devoted to the problem of low-level waste disposal. Faced with the imminent burden of the take title provision, States are limited in their ability to experiment with alternative systems of waste disposal; pressed by the deadline of that provision,

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[14]The New York State Power Authority currently operates two nuclear power plants within the State, and waste materials are produced at various state hospitals and research facilities. Moreover, with federal encouragement the State voluntarily participated in an experimental program for nuclear waste management at West Valley, New York between 1963 and 1975; ultimately the program was terminated because of health and safety concerns. However, at no time prior to the 1980 and 1985 Acts was the State's role as a generator or manager of low-level waste an obligatory burden imposed by the federal government. That role was determined by the State Legislature and Executive, in the exercise of their sovereign authority.

they are forced to adopt current technologies at a pace set by the federal Congress. Though States are left with some appearance of flexibility in choosing the details of compliance with federal demands—e.g., whether or not to join a compact; how such a compact might be organized; whether or not a compact should exclude wastes from non-member States; etc.—they are driven to these decisions not by the independent exercise of spirited legislative investigation and debate, but by the irresistible dictates of the national government.

If the Commerce Clause may be employed to authorize such mandates, then the "healthy balance of power between the States and the Federal Government" described in *Ashcroft* (111 S Ct at 2400; 410 L Ed 2d at 422) cannot prevail. Nor can there continue that "tension between federal and state power [in which] lies the promise of liberty." *Id.* In their stead stands a constitutional structure which, by permitting the States to become mere departments[15] of the federal government and

[15]As the District of Columbia Circuit noted in its instructive opinion in *District of Columbia v Train*, 521 F2d 971, 992 (D.C. Cir 1975), *vacated and remanded for consideration of mootness sub nom. EPA v Brown*, 431 US 99 (1977) (*per curiam*) (reviewing regulations promulgated by the EPA under the Clean Air Act imposing affirmative obligations upon several states to adopt a vehicle inspection and maintenance program and to require the retrofit of certain classes of vehicles with pollution control devices):

> [T]he [EPA] Administrator, in the exercise of federal power based solely on the commerce clause, cannot against a state's wishes compel it to become involved in administering the details of the regulatory scheme promulgated by the Administrator. For example, the attempt to require the state to "establish" [retrofit programs] is an impermissible encroachment on state sovereignty and goes beyond "regulation" by the Congress. It seeks, under the guise of the commerce power, to substitute compelled state regulation for permissible federal regulation. If the federal government wants to impose a program under federal authority, it is limited by the restrictions applicable thereto.
>
> . . .

(Footnote continued on next page.)

agents of the federal will, lacks all benefits of the American federalist system described by this Court in *Garcia*, *Ashcroft*, and elsewhere. In this respect, the 1985 Act is a dangerous precedent and should be declared unconstitutional.

While the take title provision contained in the 1985 Act may be avoided by compliance with other regulatory requirements, this fact renders it neither acceptable nor comparable to prior federal acts approved by this Court. Whether States adopt a program regulating the disposal of all in-state generated low-level radioactive waste in accordance with federal requirements or assume complete ownership responsibility for such wastes, including the liability that would otherwise rest with the non-state government generators under state law, the 1985 Act directly compels the States to take some type of extensive sovereign action to manage private and federal low-level

(Footnote continued.)

> In essence, the Administrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program against the owners of motor vehicles. . . . Under the regulations here, the states are to function merely as departments of the EPA, following EPA guidelines and subject to federal penalties if they refuse to comply or if their regulation of vehicles is ineffective. We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing unconsenting states to regulate activities affecting interstate commerce, and we doubt that any exist.

We bring this opinion to this Court's attention because we believe that it is an insightful examination by a lower court of federal action which closely approaches the affirmative duties imposed upon States by the LLRWPAA. Since *Train* was decided before both *Garcia* and *National League*, it reflects judicial considerations at a time when the scope of the Tenth Amendment was viewed quite narrowly, under this Court's holding in *Maryland v Wirtz*, 392 US 183 (1968) (Fair Labor Standards Act applicable to public hospitals, nursing homes, and educational institutions). *See also*, the several other EPA cases set forth in n 12, *supra*.

radioactive waste. This is an unprecedented and unconstitutional exercise of federal power.[16]

While Congress has in the past used the Commerce Clause as a basis for strongly encouraging state participation in federal regulatory schemes, such schemes have provided for voluntary state action in lieu of federal regulation (*e.g.*, Clean Air Act, 42 USC §§ 7401[a][3], 7407[a]; Clean Water Act, 33 USC § 1251[b]), or have made receipt of federal funds contingent upon voluntary compliance (*e.g.*, 23 USC § 154 [regulation of travel speed on public highways]). In cases where Congress directs that federal funding be contingent upon state participation in a federal regulatory scheme, States are left with the choice of whether the state interests advanced by such funding outweigh the burden upon the state governmental structure in fulfilling the federal regulatory functions imposed upon it. A similar choice is available to state sovereigns in cases where a federal regulatory scheme offers States the opportunity to participate in lieu of federal regulators. In all such cases, although the choice may be difficult, and the realistic probability that the State will elect not to participate in the federal regulatory scheme may be small, the choice exists nonetheless.

None of the arguments raised below in support of the 1985 Act is sufficient to justify its broad infringement upon state government powers. The claim that the LLRWPAA merely

[16]Ironically, if this federal mandate had been imposed on a private entity, it would constitute a taking which, under the Fifth Amendment, would entitle the entity to just compensation. *See, Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982). While the federal government might be free to "take" from the States authority to regulate in a given area by exercise of its power under the Supremacy Clause, its imposition on States of responsibility to enter or remain in an area against their will effectively commandeers the States' governmental processes in service of the federal government. Absent the protection of the Tenth Amendment, sovereign States would be left with fewer protections against federal intrusions than would private entities under the Fifth Amendment.

"was intended to salvage [the] approach" of the 1980 Act, which had been "unanimously endorsed by the States themselves" (US Br in Opp, p 16)[17] is both overstated and irrelevant. The 1985 Act differed substantially from its predecessor. Although New York does not concede that either Act was "endorsed" by the States, that question is of little interest here: New York's challenge to the later Act rests in the belief that even a federal act which has been supported by States' congressional delegations and promoted by various state interest groups such as the NGA may be defective insofar as it infringes upon the constitutional structure of the federal system. We submit that an essential premise of the federal system is the indispensability of State government policymaking. The federal legislative process, far removed from local problems and subject to the vagaries of sophisticated lobbying practices and other institutional pressures, simply cannot supply adequate long-term protection to that system of self-government. As Justice Powell noted in his dissent in *Garcia* (469 US at 576):

> One must compare realistically the operation of the state and local governments with that of the Federal Government. Federal legislation is drafted primarily by the staffs of the congressional committees. In view of the hundreds of bills introduced at each session of Congress and the complexity of many of them, it is virtually impossible for even the most conscientious legislators to be truly familiar with many of the statutes enacted.

The participation of a State's congressional delegation cannot sanction federal action which by its terms undermines the federal structure. That structure is mutable only by constitutional amendment pursuant to Article V, in cooperation with the States.

[17] References to "US Br in Opp" are to the United States respondents' Brief in Opposition to the Petitions for Writs of Certiorari.

Equally unavailing is the argument that the federal interest advanced under the Act justifies its terms (US Br in Opp, pp 17-18). The federal government has argued (US Br in Opp, p 18):

> [T]he subject matter involved—furnishing a safe method for long-term disposal of radioactive wastes—is one that, by its nature, is impressed with a public interest that makes participation by state governments especially appropriate, since the States will have to respond to any long-term problems the waste may produce.

This argument addressed several distinct issues. There is no question that waste disposal is a significant public problem. As such, it is a matter that many States might choose to address. Inasmuch as the disposal issue affects interstate commerce, certain federal action in the field is also appropriate, and state action may be subject to constraint by principles of preemption. In this respect, the "nature" of waste disposal is comparable to the problems of water or air pollution, addressed by federal statutes. Yet the importance of the issue to the States, or the preemptability of the field by Congress, does not justify the impressment of all States, even those that would not voluntarily participate, into the service of a federal program. *Cf. FERC v Mississippi*, 456 US at 785-786 (O'Connor, dissenting) (the fact that Congress "could have reached the same destination by a different route" is irrelevant to the Supreme Court's Tenth Amendment examination of a federal act). Participation in a federal scheme by willing States is entirely appropriate, as respondents suggest; but the LLRWPAA does not call for such willing participation.

The claim that New York's legislative decision to provide for the siting of a low-level waste facility within its borders sanctions the 1985 Act (US Br in Opp, p 19) is baseless. In

fact, that legislation was enacted only in response to the requirements of the LLRWPAA.[18]

Moreover, New York's past actions, either as a regulator of certain nuclear wastes or as a generator of wastes through New York State Power Authority nuclear power plants and state hospitals and research facilities, cannot justify the new encroachments on state sovereignty contained in the 1985 Act, in spite of the federal government's contrary suggestion (US Br in Opp, p 19). While New York has been involved in the field of radioactive materials regulation in the past as an "agreement State" under § 274 of the Atomic Energy Act (42 USC § 2021), the Agreement States Program applies a federal health and safety regulatory scheme that is altogether distinct from the LLRWPAA. It involves the willing participation of States, requires that voluntary state participants enact regulations consistent with federal standards, permits state participants to withdraw from the program, and provides a federal regulatory mechanism for those States which choose not to participate (42 USC § 2021[d]). At no time has the option of voluntary state participation in the Agreement States Program included the requirement that States enter into or remain in the business of disposing of low-level radioactive waste. Furthermore, as we have noted elsewhere, status as an agreement State offers New York only limited opportunity to regulate the generation of waste for which the 1985 Act makes it responsible, and to which the take title provision seeks to compel it to one day hold title. While New York could reduce its own share of the generation of low-level waste, it may limit generation of

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[18]*See*, Rappleyea Affidavit, JA 80a-81a. *See also*, Laws of New York 1986, chap. 673, § 2. Indeed, the New York Legislature has indicated its disagreement with the provisions of the Act through the passage of Laws of New York 1990, chap. 368, which, by providing that title to low-level waste shall at all times remain in the generator of such waste, directly contravenes certain sections of the take title provision. *See*, 1990 McKinney's Sessions Laws of New York, vol. II, p 2430 (State Executive Department Memorandum to chap. 368).

waste from other sources only insofar as the federal government permits under 42 USC § 2021. The majority of low-level waste stems from nuclear reactor facilities over which the NRC maintains exclusive health and safety regulatory authority. 10 CFR 50.2.

Contrary to the federal government's suggestion (US Br in Opp, pp 20-21), the provisions of the 1985 Act are not analogous to those involved in prior decisions of this Court upholding impositions of affirmative obligations upon State governments. Neither the duty of state trial courts of general jurisdiction to hear certain federal law claims (*Testa v Katt*, 330 US 386 [1947]), nor the susceptibility of state governments or agencies to federal judicial decree in particular cases (*Illinois v City of Milwaukee*, 406 US 91 [1972]; *Wyoming v Colorado*, 259 US 419 [1922]) imply a federal power to draft state governments into the service of federal regulatory schemes. *See, FERC*, 456 US at 784-785, 784 n 13 (O'Connor, J., dissenting in part).

Finally, the federal government provides no foundation for its claim that the responsibilities that devolve upon States under the 1985 Act are "less burdensome" than those imposed by the FLSA or the sections of TEFRA addressed by this Court in *Baker* (US Br in Opp, pp 21-22). To our knowledge, the relative economic impact of these various Acts is unknown. More importantly, this claim ignores the principal point of New York's argument: it is the nature and quality of the federal intrusion under the LLRWPAA which is constitutionally offensive, rather than the ultimate material cost of compliance with the Act. Unlike the FLSA, TEFRA, or any other federal action under the Commerce Clause previously scrutinized by this Court in light of the Tenth Amendment, the burden under the 1985 Act is uniquely imposed upon state governments and mandates the exercise of state sovereign power in accordance with a federal regulatory scheme. As this Court noted in *FERC* (456 US at 770, n 33):

> [I]n a Tenth Amendment challenge to congressional activity, "the determinative factor. . . [is] the nature of the federal action, not the ultimate economic impact on the States." *Hodel v Virginia Surface Mining & Recl., Ass., Inc.*, 452 U.S., at 292, n. 33.

For reasons described above, we submit that the nature of the federal action exemplified in the take title provision and section 3(a) of the Act exceeds the scope of congressional power delegated in the Constitution. Consequently, that action should be annulled and the 1985 Act stricken as unconstitutional.

B.

Moreover, the Act should be declared unconstitutional in its entirety. Courts have long recognized a presumption of severability of unconstitutional from constitutional sections of legislative acts, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not . . .". *Champlin Refining Co. v Corporation Commission of Oklahoma*, 286 US 210, 234 (1932). *See also, INS v Chadha*, 462 US 919, 931-32 (1983). In our view, it seems clear that Congress would not have enacted the remaining portions of the 1985 Act without the take title provision. Accordingly, a finding that this provision violates the Tenth Amendment renders the entire Act null and void.

As its legislative history makes clear, the 1985 Act was an intricate legislative compromise in which Congress sought to balance a multitude of disparate interests. During final debates on bill HR 1083, which upon enactment became the LLRWPAA, the measure was described by legislators as "a tenuous settlement" (Udall), "a delicately crafted compromise" (Bonker), "a reasonable compromise" (Markey), and

"a fundamental compromise" (Dingell). 131 Cong Rec H38115-38118 (Dec. 19, 1985). Similar remarks attesting to the lengthiness of negotiation over the measure, and the delicate nature of the balance of interests represented by the compromise bill, abounded in Senate floor debate on the measure. 131 Cong Rec S38403-38410 (December 19, 1985). Both Senator Thurmond and Senator Hollings of South Carolina recommended adoption of the bill, stressing the importance of the strict timetable for disposal site development as incentive to South Carolina, Washington and Nevada to continue to operate their sites. 131 Cong Rec S38407-38410 (December 19, 1985). As Senator Hollings observed (131 Cong Rec S38409):

> Last January, our Governor announced that he would shut our facility, if necessary, unless this issue were resolved in a form acceptable to South Carolina. I and every other member of the South Carolina congressional delegation supported him. But Governor Riley also went the extra mile, and said that he would hold good-faith discussions with those of the country that lack disposal capacity.
>
> The bill now before the Senate is the result of those discussions. It does not give the three sited States everything we would like. In fact, it is only barely acceptable. But it protects South Carolina's most important interests, and we will support it. The legislation gives the regions without sites continued access to our three waste facilities, in return for surcharges and, most importantly, a strict schedule by which other States must build their own facilities. The last point is crucial. We don't want this whole issue to resurface again in another few years.

The indispensable role of the take title provision in this compromise as a means of assuring States' compliance with the statutory timetable for development of regional or state disposal facilities was clearly attested by various members of the Senate. Senator Johnston, who together with several other senators proposed amendments to the bill which included the take title provision, expressed the importance of the concept in his description of the proposal (131 Cong Rec S38414 [Dec. 19, 1985]:)

> The substitute before us today is a compromise between the approach taken by the Committee on Energy and Natural Resources, which involves tough, enforceable milestones for State action over the next 7 years to deal with low-level radioactive waste disposal, and the approach of the Environment and Public Works Committee, which involves considerable more flexibility in the near term and a potentially very tough requirement at the end of the 7-year period that any State has failed to provide for the disposal of its low-level radioactive waste must take title to, and assume possession of, that waste.
>
> At my suggestion, all the Senators involved agreed that this sanction would be considerably strengthened if we also made such a State liable for the consequential damages resulting from the failure of the State to comply with these two requirements. . . .
>
> In my opinion, this language is essential to provide the teeth to the more flexible Environment and Public Works approach. We need this language to ensure that we are not faced in the 1990's with the same situation we face today—inaction by a few generating States and no available leverage to force action.

Senator McClure, also among the sponsors of the amended bill, stressed the importance of the stiffer milestones and penalties in the compromise proposal; he also took great care to assure that the take title provision applied to each of the regional compacts approved in Title II of the Act. 131 Cong Rec S38420 (Dec. 19, 1985). *But see*, Cong Rec H38117 (remarks of Representative Markey).

In light of these strong statements in support of the strict timetable and heavy burden of noncompliance with the Act, together with the difficult and tenuous nature of the compromise which the Act represented, it is evident that the Congress would not have passed the 1985 Act without the take title provision. Various legislators clearly expressed the dissatisfaction of South Carolina, Washington, and Nevada with milder forms of compulsion directed at waste generators, and their insistence that the States themselves be bound by statute to comply with the Act or suffer severe consequences. This legislative history strongly suggests that the principal incentives to compliance in addition to the take title provision—higher surcharges upon generators, and the power to exclude waste from non-complying States—would have been insufficient to meet these concerns.

Moreover, any presumption of severability of the take title provision is cast into doubt by the Congress's decision to approve individual regional compacts with express severability clauses under Title II of the Act. 131 Cong Rec S38410 (Dec. 19, 1985). The decision to approve severability clauses in seven separate sections of Title II while excluding such a clause in Title I strongly suggests that the provisions of Title I must stand or fall together.

CONCLUSION

The 1985 Act should be declared unconstitutional in its entirety.

Dated: Albany, New York
February 13, 1992

Respectfully submitted,

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Appendix. Low-Level Radioactive Waste Policy Amendments Act of 1985.

(Pub. L. 99-240, Title I, Jan. 15, 1986, 99 Stat. 1842)

§ 2021b. Definitions respecting low-level radioactive waste policy.

For purposes of sections 2021b to 2021j of this title:

(1) Agreement State

The term "agreement State" means a State that—

(A) has entered into an agreement with the Nuclear Regulatory Commission under section 2021 of this title; and

(B) has authority to regulate the disposal of low-level radioactive waste under such agreement.

(2) Allocation

The term "allocation" means the assignment of a specific amount of low-level radioactive waste disposal capacity to a commercial nuclear power reactor for which access is required to be provided by sited States subject to the conditions specified under sections 2021b to 202lj of this title.

(3) Commercial nuclear power reactor

The term "commercial nuclear power reactor" means any unit of a civilian light-water moderated utilization facility required to be licensed under section 2133 or 2134(b) of this title.

(4) Compact

The term "compact" means a compact entered into by two or more States pursuant to sections 2021b to 2021j of this title.

(5) Compact commission

The term "compact region" means the area consisting of all States that are members of a compact.

(6) Compact region

The term "compact commission" means the regional commission, committee, or board established in a compact to administer such compact.

(7) Disposal

The term "disposal" means the permanent isolation of low-level radioactive waste pursuant to the requirements established by the Nuclear Regulatory Commission under applicable laws, or by an agreement State if such isolation occurs in such agreement State.

(8) Generate

The term "generate", when used in relation to low-level radioactive waste, means to produce low-level radioactive waste.

(9) Low-level radioactive waste

The term "low-level radioactive waste" means radioactive material that—

(A) is not high-level radioactive waste, spent nuclear fuel, or byproduct material (as defined in section 2014(e)(2) of this title); and

(B) the Nuclear Regulatory Commission, consistent with existing law and in accordance with paragraph (A), classifies as low-level radioactive waste.

(10) Non-sited compact region

The term "non-sited compact region" means any compact region that is not a sited compact region.

(11) Regional disposal facility

The term "regional disposal facility" means a non-Federal low-level radioactive waste disposal facility in operation on January 1, 1985, or subsequently established and operated under a compact.

(12) Secretary

The term "Secretary" means the Secretary of Energy.

(13) Sited compact region

The term "sited compact region" means a compact region in which there is located one of the regional disposal facilities at Barnwell, in the State of South Carolina; Richland, in the State of Washington; or Beatty, in the State of Nevada.

(14) State

The term "State" means any State of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

§ 2021c. Responsibilities for disposal of low-level radioactive waste

(a)(1) Each State shall be responsible for providing, either by itself or in cooperation with other States, for the disposal of—

(A) low-level radioactive waste generated within the State (other than by the Federal Government) that consists of or contains class A, B, or C radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983;

(B) low-level radioactive waste described in subparagraph **(A)** that is generated by the Federal Government except such waste that is—

(i) owned or generated by the Department of Energy;

(ii) owned or generated by the United States Navy as a result of the decommissioning of vessels of the United States Navy; or

(iii) owned, or generated as a result of any research, development, testing, or production of any atomic weapon; and

(C) low-level radioactive waste described in subparagraphs (A) and (B) that is generated outside of the State and accepted for disposal in accordance with sections 2021e or 2021f of this title.

(2) No regional disposal facility may be required to accept for disposal any material—

(A) that is not low-level radioactive waste as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983, or

(B) identified under the Formerly Utilized Sites Remedial Action Program.

Nothing in this paragraph shall be deemed to prohibit a State, subject to the provisions of its compact, or a compact

region from accepting for disposal any material identified in subparagraph (A) or (B).

(b)(1) The Federal Government shall be responsible for the disposal of—

(A) low-level radioactive waste owned or generated by the Department of Energy;

(B) low-level radioactive waste owned or generated by the United States Navy as a result of the decommissioning of vessels of the United States Navy;

(C) low-level radioactive waste owned or generated by the Federal Government as a result of any research, development, testing, or production of any atomic weapon; and

(D) any other low-level radioactive waste with concentrations of radionuclides that exceed the limits established by the Commission for class C radioactive waste, as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983.

(2) All radioactive waste designated a Federal responsibility pursuant to subparagraph (b)(1)(D) that results from activities licensed by the Nuclear Regulatory Commission under the Atomic Energy Act of 1954, as amended, [42 U.S.C.A § 2011 et seq.], shall be disposed of in a facility licensed by the Nuclear Regulatory Commission that the Commission determines is adequate to protect the public health and safety.

(3) Not later than 12 months after January 15, 1986, the Secretary shall submit to the Congress a comprehensive report setting forth the recommendations of the Secretary for ensuring the safe disposal of all radioactive waste designated a Federal responsibility pursuant to subparagraph (b)(1)(D). Such report shall include—

(A) an identification of the radioactive waste involved, including the source of such waste, and the volume, concentration, and other relevant characteristics of such waste;

(B) an identification of the Federal and non-Federal options for disposal of such radioactive waste;

(C) a description of the actions proposed to ensure the safe disposal of such radioactive waste;

(D) a description of the projected costs of undertaking such actions;

(E) an identification of the options for ensuring that the beneficiaries of the activities resulting in the generation of such radioactive wastes bear all reasonable costs of disposing of such wastes; and

(F) an identification of any statutory authority required for disposal of such waste.

(4) The Secretary may not dispose of any radioactive waste designated a Federal responsibility pursuant to paragraph (b)(1)(D) that becomes a Federal responsibility for the first time pursuant to such paragraph until ninety days after the report prepared pursuant to paragraph (3) has been submitted to the Congress.

§ 2021d. Regional compacts for disposal of low-level radioactive waste

(a) In general

(1) Federal policy

It is the policy of the Federal Government that the responsibilities of the States under section 2021c of this title for the disposal of low-level radioactive waste can be most safely and effectively managed on a regional basis.

(2) Interstate compacts

To carry out the policy set forth in paragraph (1), the States may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste.

(b) Applicability to Federal activities

(1) In general

(A) Activities of the Secretary

Except as provided in subparagraph (B), no compact or action taken under a compact shall be applicable to the trans-

portation, management, or disposal of any low-level radioactive waste designated in section 2021c(a)(1)(B)(i)-(iii) of this title.

(B) Federal low-level radioactive waste disposed of at non-Federal facilities

Low-level radioactive waste owned or generated by the Federal Government that is disposed of at a regional disposal facility or non-Federal disposal facility within a State that is not a member of a compact shall be subject to the same conditions, regulations, requirements, fees, taxes, and surcharges imposed by the compact commission, and by the State in which such facility is located, in the same manner and to the same extent as any low-level radioactive waste not generated by the Federal Government.

(2) Federal low-level radioactive waste disposal facilities

Any low-level radioactive waste disposal facility established or operated exclusively for the disposal of low-level radioactive waste owned or generated by the Federal Government shall not be subject to any compact or any action taken under a compact.

(3) Effect of compacts on Federal law

Nothing contained in sections 2021b to 2021j of this title or any compact may be construed to confer any new authority on any compact commission or State—

(A) to regulate the packaging, generation, treatment, storage, disposal, or transportation of low-level radioactive waste in a manner incompatible with the regulations of the Nuclear Regulatory Commission or inconsistent with the regulations of the Department of Transportation;

(B) to regulate health, safety, or environmental hazards from source material, byproduct material, or special nuclear material;

(C) to inspect the facilities of licensees of the Nuclear Regulatory Commission;

(D) to inspect security areas or operations at the site of the generation of any low-level radioactive waste by the Federal

Government, or to inspect classified information related to such areas or operations; or

(E) to require indemnification pursuant to the provisions of chapter 171 of Title 28, (commonly referred to as the Federal Tort Claims Act) [28 U.S.C.A § 2671 et seq.], or section 170 of the Atomic Energy Act of 1954 (42 U.S.C. 2210) (commonly referred to as the Price-Anderson Act), whichever is applicable.

(4) Federal authority

Except as expressly provided in sections 2021b to 2021j of this title, nothing contained in sections 2021b to 2021j of this title or any compact may be construed to limit the applicability of any Federal law or to diminish or otherwise impair the jurisdiction of any Federal agency, or to alter, amend, or otherwise affect any Federal law governing the judicial review of any action taken pursuant to any compact.

(5) State authority preserved

Except as expressly provided in sections 2021b to 2021j of this title, nothing contained in sections 2021b to 2021j of this title expands, diminishes, or otherwise affects State law.

(c) Restricted use of regional disposal facilities

Any authority in a compact to restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the compact region shall not take effect before each of the following occurs:

(1) January 1, 1986; and

(2) the Congress by law consents to the compact.

(d) Congressional review

Each compact shall provide that every 5 years after the compact has taken effect the Congress may by law withdraw its consent.

§ 2021e. Limited availability of certain regional disposal facilities during transition and licensing periods

(a) Availability of disposal capacity

(1) Pressurized-water and boiling water reactors

During the seven-year period beginning January 1, 1986 and ending December 31, 1992, subject to the provisions of subsections (b) through (g) of this section, each State in which there is located a regional disposal facility referred to in paragraphs (1) through (3) of subsection (b) of this section, shall make disposal capacity available for low-level radioactive waste generated by pressurized water and boiling water commercial nuclear power reactors in accordance with the allocations established in subsection (c) of this section.

(2) Other sources of low-level radioactive waste

During the seven-year period beginning January 1, 1986 and ending December 31, 1992, subject to the provisions of subsections (b) through (g) of this section, each State in which there is located a regional disposal facility referred to in paragraphs (1) through (3) of subsection (b) of this section shall make disposal capacity available for low-level radioactive waste generated by any source not referred to in paragraph (1).

(3) Allocation of disposal capacity

(A) During the seven-year period beginning January 1, 1986 and ending December 31, 1992, low-level radioactive waste generated within a sited compact region shall be accorded priority under this section in the allocation of available disposal capacity at a regional disposal facility referred to in paragraphs (1) through (3) of subsection (b) of this section and located in the sited compact region in which such waste is generated.

(B) Any State in which a regional disposal facility referred to in paragraphs (1) through (3) of subsection (b) of this section is located may, subject to the provisions of its compact, prohibit the disposal at such facility of low-level radioactive waste generated outside of the compact region if the disposal

of such waste in any given calendar year, together with all other low-level radioactive waste disposed of at such facility within that same calendar year, would result in that facility disposing of a total annual volume of low-level radioactive waste in excess of 100 per centum of the average annual volume for such facility designated in subsection (b) of this section: *Provided, however,* That in the event that all three States in which regional disposal facilities referred to in paragraphs (1) through (3) of subsection (b) of this section act to prohibit the disposal of low-level radioactive waste pursuant to this subparagraph, each such State shall, in accordance with any applicable procedures of its compact, permit, as necessary, the disposal of additional quantities of such waste in increments of 10 per centum of the average annual volume for each such facility designated in subsection (b) of this section.

(C) Nothing in this paragraph shall require any disposal facility or State referred to in paragraphs (1) through (3) of subsection (b) of this section to accept for disposal low-level radioactive waste in excess of the total amounts designated in subsection (b) of this section.

(4) Cessation of operation of low-level radioactive waste disposal facility

No provision of this section shall be construed to obligate any State referred to in paragraphs (1) through (3) of subsection (b) of this section to accept low-level radioactive waste from any source in the event that the regional disposal facility located in such State ceases operations.

(b) Limitations

The availability of disposal capacity for low-level radioactive waste from any source shall be subject to the following limitations:

(1) Barnwell, South Carolina

The State of South Carolina, in accordance with the provisions of its compact, may limit the volume of low-level radioactive waste accepted for disposal at the regional disposal facility located at Barnwell, South Carolina to a total of

8,400,000 cubic feet of low-level radioactive waste during the 7-year period beginning January 1, 1986, and ending December 31, 1992 (as based on an average annual volume of 1,200,000 cubic feet of low-level radioactive waste).

(2) Richland, Washington

The State of Washington, in accordance with the provisions of its compact, may limit the volume of low-level radioactive waste accepted for disposal at the regional disposal facility located at Richland, Washington to a total of 9,800,000 cubic feet of low-level radioactive waste during the 7-year period beginning January 1, 1986, and ending December 31, 1992 (as based on an average annual volume of 1,400,000 cubic feet of low-level radioactive waste).

(3) Beatty, Nevada

The State of Nevada, in accordance with the provisions of its compact, may limit the volume of low-level radioactive waste accepted for disposal at the regional disposal facility located at Beatty, Nevada to a total of 1,400,000 cubic feet of low-level radioactive waste during the 7-year period beginning January 1, 1986, and ending December 31, 1992 (as based on an average annual volume of 200,000 cubic feet of low-level radioactive waste).

(c) Commercial nuclear power reactor allocations

(1) Amount

Subject to the provisions of subsections (a) through (g) of this section each commercial nuclear power reactor shall upon request receive an allocation of low-level radioactive waste disposal capacity (in cubic feet) at the facilities referred to in subsection (b) of this section during the 4-year transition period beginning January 1, 1986, and ending December 31, 1989, and during the 3-year licensing.period beginning January 1, 1990, and ending December 31, 1992, in an amount calculated by multiplying the appropriate number from the following table by the number of months remaining in the applicable period as determined under paragraph (2).

Reactor Type	4-year Transition Period		3-year Licensing Period	
	In Sited Region	All Other Locations	In Sited Region	All Other Locations
PWR	1027	871	934	685
BWR	2300	1951	2091	1533

(2) Method of calculation

For purposes of calculating the aggregate amount of disposal capacity available to a commercial nuclear power reactor under this subsection, the number of months shall be computed beginning with the first month of the applicable period, or the sixteenth month after receipt of a full power operating license, whichever occurs later.

(3) Unused allocations

Any unused allocation under paragraph (1) received by a reactor during the transition period or the licensing period may be used at any time after such reactor receives its full power license or after the beginning of the pertinent period, whichever is later, but not in any event after December 31, 1992, or after commencement of operation of a regional disposal facility in the compact region or State in which such reactor is located, whichever occurs first.

(4) Transferability

Any commercial nuclear power reactor in a State or compact region that is in compliance with the requirements of subsection (e) of this section may assign any disposal capacity allocated to it under this subsection to any other person in each State or compact region. Such assignment may be for valuable consideration and shall be in writing, copies of which shall be filed at the affected compact commissions and States, along with the assignor's unconditional written waiver of the disposal capacity being assigned.

(5) Unusual volumes

(A) The Secretary may, upon petition by the owner or operator of any commercial nuclear power reactor, allocate to such reactor disposal capacity in excess of the amount calcu-

lated under paragraph (1) if the Secretary finds and states in writing his reasons for so finding that making additional capacity available for such reactor through this paragraph is required to permit unusual or unexpected operating, maintenance, repair or safety activities.

(B) The Secretary may not make allocations pursuant to subparagraph (A) that would result in the acceptance for disposal of more than 800,000 cubic feet of low-level radioactive waste or would result in the total of the allocations made pursuant to this subsection exceeding 11,900,000 cubic feet over the entire seven-year interim access period.

(6) Limitation

During the seven-year interim access period referred to in subsection (a) of this section, the disposal facilities referred to in subsection (b) of this section shall not be required to accept more than 11,900,000 cubic feet of low-level radioactive waste generated by commercial nuclear power reactors.

(d)(1) Surcharges

The disposal of any low-level radioactive waste under this section (other than low-level radioactive waste generated in a sited compact region) may be charged a surcharge by the State in which the applicable regional disposal facility is located, in addition to the fees and surcharges generally applicable for disposal of low-level radioactive waste in the regional disposal facility involved. Except as provided in subsection (e)(2) of this section, such surcharges shall not exceed—

(A) in 1986 and 1987, $10 per cubic foot of low-level radioactive waste;

(B) in 1988 and 1989, $20 per cubic foot of low-level radioactive waste; and

(C) in 1990, 1991, and 1992, $40 per cubic foot of low-level radioactive waste.

(2) Milestone incentives

(A) Escrow account

Twenty-five per centum of all surcharge fees received by a State pursuant to paragraph (1) during the seven-year period

referred to in subsection (a) of this section shall be transferred on a monthly basis to an escrow account held by the Secretary. The Secretary shall deposit all funds received in a special escrow account. The funds so deposited shall not be the property of the United States. The Secretary shall act as trustee for such funds and shall invest them in interest-bearing United States Government Securities with the highest available yield. Such funds shall be held by the Secretary until—

(i) paid or repaid in accordance with subparagraph (B) or (C); or

(ii) paid to the State collecting such fees in accordance with subparagraph (F).

(B) Payments

(i) July 1, 1986

The twenty-five per centum of any amount collected by a State under paragraph (1) for low-level radioactive waste disposed of under this section during the period beginning on January 15, 1986, and ending June 30, 1986, and transferred to the Secretary under subparagraph (A), shall be paid by the Secretary in accordance with subparagraph (D) if the milestone described in subsection (e)(1)(A) of this section is met by the State in which such waste originated.

(ii) January 1, 1988

The twenty-five per centum of any amount collected by a State under paragraph (1) for low-level radioactive waste disposed of under this section during the period beginning July 1, 1986 and ending December 31, 1987, and transferred to the Secretary under subparagraph (A), shall be paid by the Secretary in accordance with subparagraph (D) if the milestone described in subsection (e)(1)(B) of this section is met by the State in which such waste originated (or its compact region, where applicable).

(iii) January 1, 1990

The twenty-five per centum of any amount collected by a State under paragraph (1) for low-level radioactive waste disposed of under this section during the period beginning

January 1, 1988 and ending December 31, 1989, and transferred to the Secretary under subparagraph (A), shall be paid by the Secretary in accordance with subparagraph (D) if the milestone described in subsection (e)(1)(C) of this section is met by the State in which such waste originated (or its compact region, where applicable).

(iv) The twenty-five per centum of any amount collected by a State under paragraph (1) for low-level radioactive waste disposed of under this section during the period beginning January 1, 1990 and ending December 31, 1992, and transferred to the Secretary under subparagraph 1 (A), shall be paid by the Secretary in accordance with subparagraph (D) if, by January 1, 1993, the State in which such waste originated (or its compact region, where applicable) is able to provide for the disposal of all low-level radioactive waste generated within such State or compact region.

(C) Failure to meet January 1, 1993 deadline

If, by January 1, 1993, a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region—

(i) each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, shall be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1993 as the generator or owner notifies the State that the waste is available for shipment; or

(ii) if such State elects not to take title to, take possession of, and assume liability for such waste, pursuant to clause (i), twenty-five per centum of any amount collected by a State under paragraph (1) for low-level radioactive waste disposed of under this section during the period beginning January 1, 1990 and ending December 31, 1992 shall be repaid, with interest, to each generator from whom such surcharge was collected. Repayments made pursuant to this clause shall be made on a monthly basis, with the first such repayment beginning on February 1, 1993, in an amount equal to one thirty-sixth of the total amount required to be repaid pursuant to this clause, and shall continue until the State (or, where applicable, compact region) in which such low-level radioactive waste is generated is able to provide for the disposal of all such waste generated within such State or compact region or until January 1, 1996, whichever is earlier.

If a State in which low-level radioactive waste is generated elects to take title to, take possession of, and assume liability for such waste pursuant to clause (i), such State shall be paid such amounts. as are designated in subparagraph (B)(iv). If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated provides for the disposal of such waste at any time after January 1, 1993 and prior to January 1, 1996, such State (or, where applicable, compact region) shall be paid in accordance with subparagraph (D) a lump sum amount equal to twenty-five per centum of any amount collected by a State under paragraph (1): *Provided, however,* That such payment shall be adjusted to reflect the remaining number of months between January 1, 1993 and January 1, 1996 for which such State (or, where applicable, compact region) provides for the disposal of such waste. If a State (or, where applicable, a compact region) in which low-level radioactive waste is generated is unable to provide for the disposal of all such waste generated within such State or compact region by January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take posession of the

waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.

(D) Recipients of payments

The payments described in subparagraphs (B) and (C) shall be paid within thirty days after the applicable date—

(i) if the State in which such waste originated is not a member of a compact region, to such State;

(ii) if the State in which such waste originated is a member of the compact region, to the compact commission serving such State.

(E) Uses of payments

(i) Limitations

Any amount paid under subparagraphs (B) or (C) may only be used to—

(I) establish low-level radioactive waste disposal facilities;

(II) mitigate the impact of low-level radioactive waste disposal facilities on the host State;

(III) regulate low-level radioactive waste disposal facilities; or

(IV) ensure the decommissioning, closure, and care during the period of institutional control of low-level radioactive waste disposal facilities.

(ii) Reports

(I) Recipient

Any State or compact commission receiving a payment under subparagraphs (B) or (C) shall, on December 31 of each year in which any such funds are expended, submit a report to the Department of Energy itemizing any such expenditures.

(II) Department of Energy

Not later than six months after receiving the reports under subclause (I), the Secretary shall submit to the Congress a summary of all such reports that shall include an assessment of the compliance of each such State or compact commission with the requirements of clause (i).

(F) Payment to States

Any amount collected by a State under paragraph (1) that is placed in escrow under subparagraph (A) and not paid to a State or compact commission under subparagraphs (B) and (C) or not repaid to a generator under subparagraph (C) shall be paid from such escrow account to such State collecting such payment under paragraph (1). Such payment shall be made not later than 30 days after a detemination of ineligibility for a refund is made.

(G) Penalty surcharges

No rebate shall be made under this subsection of any surcharge or penalty surcharge paid during a period of noncompliance with subsection (e)(1) of this section.

(e) Requirements for access to regional disposal facilities

(1) Requirements for non-sited compact regions and non-member States

Each non-sited compact region, or State that is not a member of a compact region that does not have an operating disposal facility, shall comply with the following requirements:

(A) By July 1, 1986, each such non-member State shall ratify compact legislation or, by the enactment of legislation or the certification of the Governor, indicate its intent to develop a site for the location of a low-level radioactive waste disposal facility within such State.

(B) By January 1, 1988.—

(i) each non-sited compact region shall identify the State in which its low-level radioactive waste disposal facility is to be located, or shall have selected the developer for such facility and the site to be developed, and each compact region or the State in which its low-level radioactive waste disposal facility is to be located shall develop a siting plan for such facility providing detailed procedures and a schedule for establishing a facility location and preparing a facility license application and shall delegate authority to implement such plan;

(ii) each non-member State shall develop a siting plan providing detailed procedures and a schedule for establishing a facility location and preparing a facility license application for a low-level radioactive waste disposal facility and shall delegate authority to implement such plan; and

(iii) The siting plan required pursuant to this paragraph shall include a description of the optimum way to attain operation of the low-level radioactive waste disposal facility involved, within the time period specified in sections 2021b to 2021j of this title. Such plan shall include a description of the objectives and a sequence of deadlines for all entities required to take action to implement such plan, including, to the extent practicable, an identification of the activities in which a delay in the start, or completion, of such activities will cause a delay in beginning facility operation. Such plan shall also identify, to the extent practicable, the process for (1) screening for broad siting areas; (2) identifying and evaluating specific candidate sites; and (3) characterizing the preferred site(s), completing all necessary environmental assessments, and preparing a license application for submission to the Nuclear Regulatory Commission or an Agreement State.

(C) By January 1, 1990.—

(i) a complete application (as determined by the Nuclear Regulatory Commission or the appropriate agency of an agreement State) shall be filed for a license to operate a low-level radioactive waste disposal facility within each non-sited compact region or within each non-member State; or

(ii) the Governor (or, for any State without a Governor, the chief executive officer) of any State that is not a member of a compact region in compliance with clause (i), or has not complied with such clause by its own actions, shall provide a written certification to the Nuclear Regulatory Commission, that such State will be capable of providing for, and will provide for, the storage, disposal, or management of any low-level radioactive waste generated within such State and requiring disposal after December 31, 1992, and include a description of the actions that will be taken to ensure that such capacity exists.

(D) By January 1, 1992, a complete application (as determined by the Nuclear Regulatory Commission or the appropriate agency of an agreement State) shall be filed for a license to operate a low-level radioactive waste disposal facility within each non-sited compact region or within each non-member State.

(E) The Nuclear Regulatory Commission shall transmit any certification received under subparagraph (C) to the Congress and publish any such certification in the Federal Register.

(F) Any State may, subject to all applicable provisions, if any, of any applicable compact, enter into an agreement with the compact commission of a region in which a regional disposal facility is located to provide for the disposal of all low-level radioactive waste generated within such State, and, by virtue of such agreement, may, with the approval of the State in which the regional disposal facility is located, be

deemed to be in compliance with subparagraphs (A), (B), (C), and (D).

(2) Penalties for failure to comply

(A) By July 1, 1986

If any State fails to comply with subparagraph (1)(A)—

(i) any generator of low-level radioactive waste within such region or non-member State shall, for the period beginning July 1, 1986, and ending December 31, 1986, be charged 2 times the surcharge otherwise applicable under subsection (d) of this section; and

(ii) on or after January 1, 1987, any low-level radioactive waste generated within such region or non-member State may be denied access to the regional disposal facilities referred to in paragraphs (1) through (3) of subsection (b) of this section.

(B) By January 1, 1988

If any non-sited compact region or non-member State fails to comply with paragraph (1)(B)—

(i) any generator of low-level radioactive waste within such region or non-member State shall—

(I) for the period beginning January 1, 1988, and ending June 30, 1988, be charged 2 times the surcharge otherwise applicable under subsection (d) of this section; and

(II) for the period beginning July 1, 1988, and ending December 31, 1988, be charged 4 times the surcharge otherwise applicable under subsection (d) of this section; and

(ii) on or after January 1, 1989, any low-level radioactive waste generated within such region or non-member State may be denied access to the regional disposal facilities referred to in paragraphs (1) through (3) of subsection (b) of this section.

(C) By January 1, 1990

If any non-sited compact region or non-member State fails to comply with paragraph (1)(C), any low-level radioactive waste generated within such region or non-member State may be denied access to the regional disposal facilities referred to in paragraphs (1) through (3) of subsection (b) of this section.

(D) By January 1, 1992

If any non-sited compact region or non-member State fails to comply with paragraph (1)(D), any generator of low-level radioactive waste within such region or non-member State shall, for the period beginning January 1, 1992 and ending upon the filing of the application described in paragraph (1)(D), be charged 3 times the surcharge otherwise applicable under subsection (d) of this section.

(3) Denial of access

No denial or suspension of access to a regional disposal facility under paragraph (2) may be based on the source, class, or type of low-level radioactive waste.

(4) Restoration of suspended access; penalties for failure to comply

Any access to a regional disposal facility that is suspended under paragraph (2) shall be restored after the non-sited compact region or non-member State involved complies with such requirement. Any payment of surcharge penalties pursuant to paragraph (2) for failure to comply with the requirements of subsection (e) of this section shall be terminated after the non-sited compact region or non-member State involved complies with such requirements.

(f)(1) Administration

Each State and compact commission in which a regional disposal facility referred to in paragraphs (1) through (3) of subsection (b) of this section is located shall have authority—

(A) to monitor compliance with the limitations, allocations, and requirements established in this section; and

(B) to deny access to any non-Federal low-level radioactive waste disposal facilities within its borders to any low-level radioactive waste that—

(i) is in excess of the limitations or allocations established in this section; or

(ii) is not required to be accepted due to the failure of a compact region or State to comply with the requirements of subsection (e)(1) of this section.

(2) Availability of information during interim access period

(A) The States of South Carolina, Washington, and Nevada may require information from disposal facility operators, generators, intermediate handlers, and the Department of Energy that is reasonably necessary to monitor the availability of disposal capacity, the use and assignment of allocations and the applicability of surcharges.

(B) The States of South Carolina, Washington, and Nevada may, after written notice followed by a period of at least 30 days, deny access to disposal capacity to any generator or intermediate handler who fails to provide information under subparagraph (A).

(C) Proprietary information.—

(i) Trade secrets, proprietary and other confidential information shall be made available to a State under this subsection upon request only if such State—

(I) consents in writing to restrict the dissemination of the information to those who are directly involved in monitoring under subparagraph (A) and who have a need to know;

(II) accepts liability for wrongful disclosure; and

(III) demonstrates that such information is essential to such monitoring.

(ii) The United States shall not be liable for the wrongful disclosure by any individual or State of any information provided to such individual or State under this subsection.

(iii) Whenever any individual or State has obtained possession of information under this subsection, the individual shall be subject to the same provisions of law with respect to the disclosure of such information as would apply to an officer or employee of the United States or of any department or agency thereof and the State shall be subject to the same provisions of law with respect to the disclosure of such information as would apply to the United States or any department or agency thereof. No State or State officer or employee who receives trade secrets, proprietary information, or other confidential information under sections 2021b to 2021j of this title may be required to disclose such information under State law.

(g) Nondiscrimination

Except as provided in subsections (b) through (e) of this section, low-level radioactive waste disposed of under this section shall be subject without discrimination to all applicable legal requirements of the compact region and State in which the disposal facility is located as if such low-level radioactive waste were generated within such compact region.

§ 2021f. Emergency access

(a) In general

The Nuclear Regulatory Commission may grant emergency access to any regional disposal facility or non-Federal disposal facility within a State that is not a member of a compact for

specific low-level radioactive waste, if necessary to eliminate an immediate and serious threat to the public health and safety or the common defense and security. The procedure for granting emergency access shall be as provided in this section.

(b) Request for emergency access

Any generator of low-level radioactive waste, or any Governor (or, for any State without a Governor, the chief executive officer of the State) on behalf of any generator or generators located in his or her State, may request that the Nuclear Regulatory Commission grant emergency access to a regional disposal facility or a non-Federal disposal facility within a State that is not a member of a compact for specific low-level radioactive waste. Any such request shall contain any information and certifications the Nuclear Regulatory Commission may require.

(c) Determination of Nuclear Regulatory Commission

(1) Required determination

Not later than 45 days after receiving a request under subsection (b) of this section, the Nuclear Regulatory Commission shall determine whether—

(A) emergency access is necessary because of an immediate and serious threat to the public health and safety or the common defense and security; and

(B) the threat cannot be mitigated by any alternative consistent with the public health and safety, including storage of low-level radioactive waste at the site of generation or in a storage facility obtaining access to a disposal facility by voluntary agreement, purchasing disposal capacity available for assignment pursuant to section 2021e(c) of this title or ceasing activities that generate low-level radioactive waste.

(2) Required notification

If the Nuclear Regulatory Commission makes the determinations required in paragraph (1) in the affirmative, it shall designate an appropriate non-Federal disposal facility or facilities, and notify the Governor (or chief executive officer) of the State in which such facility is located and the appropriate

compact commission that emergency access is required. Such notification shall specifically describe the low-level radioactive waste as to source, physical and radiological characteristics, and the minimum volume and duration, not exceeding 180 days, necessary to alleviate the immediate threat to public health and safety or the common defense and security. The Nuclear Regulatory Commission shall also notify the Governor (or chief executive officer) of the State in which the low-level radioactive waste requiring emergency access was generated that emergency access has been granted and that, pursuant to subsection (e) of this section, no extension of emergency access may be granted absent diligent State action during the period of the initial grant.

(d) Temporary emergency access

Upon determining that emergency access is necessary because of an immediate and serious threat to the public health and safety or the common defense and security, the Nuclear Regulatory Commission may at its discretion grant temporary emergency access, pending its determination whether the threat could be mitigated by any alternative consistent with the public health and safety. In granting access under this subsection, the Nuclear Regulatory Commission shall provide the same notification and information required under subsection (c) of this section. Absent a determination that no alternative consistent with the public health and safety would mitigate the threat, access granted under this subsection shall expire 45 days after the granting of temporary emergency access under this subsection.

(e) Extension of emergency access

The Nuclear Regulatory Commission may grant one extension of emergency access beyond the period provided in subsection (c) of this section, if it determines that emergency access continues to be necessary because of an immediate and serious threat to the public health and safety or the common defense and security that cannot be mitigated by any alternative consistent with the public health and safety, and that the

generator of low-level radioactive waste granted emergency access and the State in which such low-level radioactive waste was generated have diligently though unsuccessfully acted during the period of the initial grant to eliminate the need for emergency access. Any extension granted under this subsection shall be for the minimum volume and duration of the Nuclear Regulatory Commission finds necessary to eliminate the immediate threat to public health and safety or the common defense and security, and shall not in any event exceed 180 days.

(f) Reciprocal access

Any compact region or State not a member of a compact that provides emergency access to non-Federal disposal facilities within its borders shall be entitled to reciprocal access to any subsequently operating non-Federal disposal facility that serves the State or compact region in which low-level radioactive waste granted emergency access was generated. The compact commission or State having authority to approve importation of low-level radioactive waste to the disposal facility to which emergency access was granted shall designate for reciprocal access an equal volume of low-level radioactive waste having similar characteristics to that provided emergency access.

(g) Approval by compact commission

Any grant of access under this section shall be submitted to the compact commission for the region in which the designated disposal facility is located for such approval as may be required under the terms of its compact. Any such compact commission shall act to approve emergency access not later than 15 days after receiving notification from the Nuclear Regulatory Commission, or reciprocal access not later than 15 days after receiving notification from the appropriate authority under subsection (f) of this section.

(h) Limitations

No State shall be required to provide emergency or reciprocal access to any regional disposal facility within its borders

for low-level radioactive waste not meeting criteria established by the license or license agreement of such facility, or in excess of the approved capacity of such facility, or to delay the closing of any such facility pursuant to plans established before receiving a request for emergency or reciprocal access. No State shall, during any 12-month period, be required to provide emergency or reciprocal access to any regional disposal facility within its borders for more than 20 percent of the total volume of low-level radioactive waste accepted for disposal at such facility during the previous calendar year.

(i) Volume reduction and surcharges

Any low-level radioactive waste delivered for disposal under this section shall be reduced in volume to the maximum extent practicable and shall be subject to surcharges established in sections 2021b to 2021j of this title.

(j) Deduction from allocation

Any volume of low-level radioactive waste granted emergency or reciprocal access under this section, if generated by any commercial nuclear power reactor, shall be deducted from the low-level radioactive waste volume allocable under section 2021e(c) of this title.

(k) Agreement States

Any agreement under section 2021 of this title shall not be applicable to the determinations of the Nuclear Regulatory Commission under this section.

§ 2021g. Responsibilities of Department of Energy

(a) Financial and technical assistance

The Secretary shall, to the extent provided in appropriations Act, provide to those compact regions, host States, and nonmember States determined by the Secretary to require assistance for purposes of carrying out sections 2021b to 2021j of this title.—

(1) continuing technical assistance to assist them in fulfilling their responsibilities under sections 2021b to 2021j of this title. Such technical assistance shall include, but not be limited

to, technical guidelines for site selection, alternative technologies for low-level radioactive waste disposal, volume reduction options, management techniques to reduce low-level waste generation, transportation practices for shipment of low-level wastes, health and safety considerations in the storage, shipment and disposal of low-level radioactive wastes, and establishment of a computerized database to monitor the management of Low-level radioactive wastes; and

(2) through the end of fiscal year 1993, financial assistance to assist them in fulfilling their responsibilities under sections 2021b to 202lj of this title.

(b) Reports

The Secretary shall prepare and submit to the Congress on an annual basis a report which (1) summarizes the progress of low-level waste disposal siting and licensing activities within each compact region, (2) reviews the available volume reduction technologies, their applications, effectiveness, and costs on a per unit volume basis, (3) reviews interim storage facility requirements, costs, and usage, (4) summarizes transportation requirements for such wastes on an inter- and intra-regional basis, (5) summarizes the data on the total amount of low-level waste shipped for disposal on a yearly basis, the proportion of such wastes subjected to volume reduction, the average volume reduction attained, and the proportion of wastes stored on an interim basis, and (6) projects the interim storage and final disposal volume requirements anticipated for the following year, on a regional basis.

§ 2021h. Alternative disposal methods

(a) Not later than 12 months after January 15, 1986, the Nuclear Regulatory Commission shall, in consultation with the States and other interested persons, identify methods for the disposal of Low-level radioactive waste other than shallow land burial, and establish and publish technical guidance regarding licensing of facilities that use such methods.

(b) Not later than 24 months after January 15, 1986, the Commission shall, in consultation with the States and other interested persons, identify and publish all relevant technical information regarding the methods identified pursuant to subsection (a) of this section that a State or compact must provide to the Commission in order to pursue such methods, together with the technical requirements that such facilities must meet, in the judgment of the Commission, if pursued as an alternative to shallow land burial. Such technical information and requirements shall include, but need not be limited to, site suitability, site design, facility operation, disposal site closure, and environmental monitoring, as necessary to meet the performance objectives established by the Commission for a licensed low-level radioactive waste disposal facility. The Commission shall specify and publish such requirements in a manner and form deemed appropriate by the Commission.

§ 2021i. Licensing review and approval

In order to ensure the timely development of new low-level radioactive waste disposal facilities, the Nuclear Regulatory Commission or, as appropriate, agreement States, shall consider an application for a disposal facility license in accordance with the laws applicable to such application, except that the Commission and the agreement state[1] shall—

(1) not later than 12 months after January 15, 1986, establish procedures and develop the technical capability for processing applications for such licenses;

(2) to the extent practicable, complete all activities associated with the review and processing of any application for such a license (except for public hearings) no later than 15 months after the date of receipt of such application; and

(3) to the extent practicable, consolidate all required technical and environmental reviews and public hearings.

§ 2021j. Radioactive waste below regulatory concern

(a) Not later than 6 months after January 15, 1986, the Commission shall establish standards and procedures, pursuant to existing authority, and develop the technical capability for considering and acting upon petitions to exempt specific radioactive waste streams from regulation by the Commission due to the presence of radionuclides in such waste streams in sufficiently low concentrations or quantities as to be below regulatory concern.

(b) The standards and procedures established by the Commission pursuant to subsection (a) of this section shall set forth all information required to be submitted to the Commission by licensees in support of such petitions, including, but not limited to—

(1) a detailed description of the waste materials, including their origin, chemical composition, physical state, volume, and mass; and

(2) the concentration or contamination levels, half-lives, and identities of the radionuclides present.

Such standards and procedures shall provide that, upon receipt of a petition to exempt a specific radioactive waste stream from regulation by the Commission, the Commission shall determine in an expeditious manner whether the concentration or quantity of radionuclides present in such waste stream requires regulation by the Commission in order to protect the public health and safety. Where Commission determines that regulation of a radioactive waste stream is not necessary to protect the public health and safety, the Commission shall take such steps as may be necessary, in an expeditious manner, to exempt the disposal of such radioactive waste from regulation by the Commission.